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IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

ORIGINAL COPY

EDWARD JOHN BULLWINKLE, III)
)
Appellant,)
v.)
)
PEOPLE OF THE STATE OF CALIFORNIA,)
)
Appellee.)

On Appeal from the Court of Appeal

for the Second Appellate District of California

Reply

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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FEDERAL RULES OF APPELLATE PROCEDURE

28 (i) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

1 (a) Scope of rules. These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

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EDWARD JOHN BULLWINKLE, III,
Appellant,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

I

APPELLANT HAS A REASONABLE EXPECTATION OF PRIVACY IN HIS WIFE'S PURSE

This Court held in Rawlings v. Kentucky (1980) _____U.S._____, 65 L.Ed.2d 633, 100 S.Ct.____, that "arcane" concepts of property law ought not to control the ability to claim the protections of the Fourth Amendment. Nevertheless, as Mr. Justice Blackmun points out in his concurring opinion, not every concept of ownership or possession is "arcane" and, in some circumstances, property interests may be considered weighty factors in establishing a reasonable expectation of privacy under the Fourth Amendment. In rejecting some property concepts the Court has not altogether abandoned the use of others in determining the presence or absence of the privacy

interests protected by the Fourth Amendment. [Rakas v. Illinois (1978) 439 U.S. 128, 58 L.Ed.2d 387, 401 (footnote 12), 99 S.Ct. 421]

California's Community Property laws are of particular relevance in a discussion of whether or not Mr. Bullwinkle had a legitimate expectation of privacy in his wife's purse. It is, of course, necessary for him to extablish this point in order to be able to join his wife Lisa in attacking the illegal search and seizure.

Unlike the arcane distinctions between quests and licensees that this Court refused to apply in Rakas v. Illinois, supra at p.401, the community property laws of California have been frequently changed by amendments to the Civil Code. They do not exist only "in the desiccated atmosphere of ancient maxims and dusty books."[Rawlings v. Kentucky, supra at p.647]

These modern concepts of marital property rights are important considerations in a determination of the rights and legitimate expectations of either spouse concerning their community property. Furthermore, these concepts are evidence of the "understandings that are recognized and permitted by society" that this Court has considered significant in discussion of the legitimacy of an appellant's expectation of privacy. [Rakas v. Illinois, supra]

Appellee argues that Mr. Bullwinkle's position is weaker than that of the defendant in Rawlings. On the contrary, appellant's position is much stronger. Mr. Bullwinkle, like Mr. Rawlings, owned the property found in the purse, in this case the passport. In addition, Mr. Bullwinkle, unlike Mr. Rawlings, had a community property interest in the purse. Because both husband and wife have dominion and control over

community property and because both spouses were using the purse, to hold their valuables, both Lisa and Edward Bullwinkle had a reasonable expectation that their valuables were safe from governmental intrusion.

Appellee also argues that a "purse" normally creates an expectation of privacy only in the person to whom it belongs. This is similar to the argument rejected in Jones v. United States (1960) 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725. It is more likely that the expectation of privacy is in the one who uses the "purse", just as the defendant in Jones had a legitimate privacy interest in the premises he was using. The facts here indicate that both spouses were using the "purse" to hold their valuables. The presence of Mr. Bullwinkle's passport in what has been called his wife's "purse" is prima facie evidence of the fact that he had an objectively reasonable expectation of privacy in that "purse". This evidence is sufficient to meet appellant's burden of proof.

Appellee's analysis of Mr. Bullwinkle's expectation of privacy in the "purse" stems from a sexual stereotyping that is inapplicable and impermissible in a discussion of constitutional rights. If the "purse" had been called by another name, i.e. a piece of luggage, and was used by both husband and wife as a depository for their personal belongings, there would be no doubt that Mr. Bullwinkle had an expectation of privacy in that piece of luggage regardless of who normally carried it, or what the item was otherwise called.

Because the item is called a "purse" rather than a "suitcase", appellee finds it difficult to accept that appellant, a man, could have a reasonable expectation of privacy in an item traditionally considered belonging to a woman. There are two important points to be considered with regard to this problem:

1) The changing fashions in today's society no longer preclude a man from owning or using a "purse" to carry toiletries and items of personal identification. Modern fashions make it difficult for men to carry identification or other items in the pockets of tight fitting pants or in jackets or shirts which may not have pockets or at best have only small ones. As a result, it is not unusual for men to be seen carrying leather bags similar to a "purse". 2) Lisa Bullwinkle's "purse" is a closed container and should be considered in such neutral terms for the purpose of discussing the constitutional issues in this case.

The expectation of privacy of appellant, husband, in a closed container owned by and used by both spouses is relevant to the issues in this case; the believability of a man, husband's expectation of privacy in a woman, wife's "purse" is not an accurate way to phrase the issue. The sexual connotations surrounding the term "purse" should not be a factor in the discussion of Mr. Bullwinkle's expectation of privacy. The issues in this case concern a closed container used as a depository by both spouses for items of identification, checkbooks and other valuables. Both appellant and his wife had a legitimate expectation of privacy in the closed container jointly used by them.

Contrary to appellee's argument the evidence is sufficient to support a finding that appellant had a reasonable expectation of privacy in his wife's "purse".

In additon, there is a serious question of modern property rights as an indication of an individual's expectation of privacy under the Fourth Amendment. The issues presented are substantial and require further consideration and clarification by this Court.

II

TIMELINESS DEFECT IS NOT JURISDICTIONAL

Timely docketing of a Jurisdictional Statement is not a jurisdictional requisite. [Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 445, 38 L.Ed.635, 640, 94 S.Ct.656 (1974); Johnson v. Florida 391 U.S. 596, 598, 20 L.Ed.2d 838, 99 S.Ct. 1713 (1968)] The court has not always enforced the provisions of its Rule 12(1) and has allowed appeals despite untimely doceting. [Communist Party of Indiana v. Whitcomb, supra; Johnson v. Florida, supra (56 days late); United Public Workers of America v Mitchell, 330 U.S. 75; 91 L.Ed. 754, 756, 67 S.Ct. 556]

In this instance the Jurisdictional Statement was filed three days late due to a mistake in calculation of the time period by counsel's office and an apparent misinterpretation of a telephone conversation with the Court's clerk in charge of docketing, Mr. Ed. Schate. (Please see attached declaration of M. Margaret Blanchard.) The mistake was unintentional and once discovered, a good faith effort was made to deliver the statement as soon as possible.

Unlike Pittsburgh Towing Co. v Mississippi Barge Line, 385 U.S. 32, 17 L.Ed.2d 31, 87 S.Ct. 195 which appellee cites in support of its motion to dismiss for untimeliness, this is not an example of a lengthy delay by counsel apparently unaccompanied by any effort to contact the Court regarding the delay. On the contrary, appellant's counsel honestly believed the statement would be filed on time and when that did not appear to be possible, the Court's clerk in charge of docketing was contacted.

This is a criminal case where appellant is being deprived of his liberty as a result of a violation of his Fourth Amendment rights. The Court has indicated in past decisions an apparent willingness to relax its own rules in criminal cases where the ends of justice so require. [Schacht v. United States (1970) 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555; Durham v. United States (1971) 401 U.S. 491, 28 L.Ed. 2d 200, 91 S.Ct. 858; Taglianetti v. United States (1969) 394 U.S. 316, 22 L.Ed.2d 302, 89 S.Ct. 1099]

Since appellee has not alleged any injury by appellants inadvertent delay and the issues presented in this appeal are substantial, appellant requests that the court exercise its discretion to forgive appellant's mistake and deny the motion to dismiss.

III

ISSUES II THROUGH IV OF APPELLANT'S JURISDICTIONAL STATEMENT HAVE BEEN PROPERLY RAISED.

"Parties interested jointly, severally, or otherwise in a judgement may join in an appeal therefrom; or any one or more of them may appeal separately; or any two or more of them may join in an appeal. Where two or more cases that involve identical or closely related questions are appealed from the same court, it will suffice to file a single jurisdictional statement covering all the issues." Rule 10(6)

Issues II - IV in appellant's Jurisdictional Statement, pp.2-4, are identical to questions I - III in the Jurisdictional Statement of Lisa Bullwinkle, Docket #80-5263. Appellant Edward John Bullwinkle, in the interest of brevity

and to prevent needless repetition, joins in that Jurisdictional Statement pursuant to Rule 10(6).

In an effort to clarify the single issue not shared by the two cases, appellant filed his own Jurisdictional Statement so that all issues properly before this Court may be raised.

There has been no attempt by appellant to circumvent the thirty (30) page limitation in Rule 15(3). Appellant believes his Jurisdictional Statement is proper although it is admitted that the authority for incorporating questions and arguments in Lisa Bullwinkle's Jurisdictional Statment is Rule 10(6) and not 15(3) as previously quoted.

Although appellee is unable to find any authority for the incorporation by reference appellant finds Federal Rule of Appellate Procedure 28(i) applicable here. The rule allows any appellant or appellee in a case involving more than one appellant or appellee to adopt by reference any part of the brief of another as well as allowing them to join in a single brief.

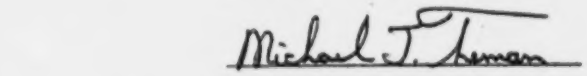
The Rules of Appellate Procedure govern procedure in appeals to United States courts of appeals in applications for writs or other relief which a court of appeals is competent to give. [FRAP 1(a)] Since the United States Supreme Court is the highest court of appeal in the nation and because FRAP 28(i) is not in direct conflict with any United States Supreme Court rule it is appellant's belief that issues II through IV of its Jurisdictional Statment have properly raised questions of substantial constitutional importance through incorporation by reference.

CONCLUSION

Appellee State of California has failed to present any significant argument in support of its motion to dismiss or affirm that would outweigh the substantiality of the questions presented by this appeal. Appellant respectfully urges the Court to overrule the Motion to Dismiss or Affirm and to place the argument on its calendar.

DATED: November 3, 1980

Respectfully submitted,



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NO. 80-5426

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Appellee.

CERTIFICATE OF SERVICE

Undersigned, a member in good standing of the bars of California and the Supreme Court of the United States, hereby certifies that service of Appellant's Brief in Opposition to Motion to Dismiss has been made, pursuant to rule 28.3, on all parties required to be served, through their counsel, this 4th day of November, 1980, by placing copies thereof in the United States mail, first class postage pre-paid, addressed to:

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DATED: November 4, 1980

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